No. 83-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

MONSANTO COMPANY,
Appellee.

On Appeal From The United States District Court For The Eastern District Of Missouri

BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

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PPG Industries, Inc., ("PPG") submits this brief *amicus curiae* having obtained written consent from both parties. This brief supports the constitutionality of the compulsory arbitration provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

INTEREST AND POSITION OF THE AMICUS

PPG manufactures and sells the pesticide butylate, a product originally developed and registered under FIFRA by Stauffer Chemical Company ("Stauffer"). When it sought its two butylate registrations, PPG cited test data previously submitted to the United States Environmen-

tal Protection Agency ("EPA") by Stauffer, in accordance with FIFRA's "follow-on" registration program. As the statute commands, PPG offered Stauffer compensation for EPA's reliance on Stauffer's test data in granting PPG's registrations. When the parties were unable to agree on the amount of compensation, Stauffer initiated binding arbitration, as mandated by the statute. An arbitration award was rendered, which PPG has challenged in the Federal District Court for the District of Columbia. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, No. 83-1941 (filed July 7, 1983). This is the first and only award ever issued under the compulsory arbitration provision of the Act.

PPG's interest in the present case is direct and substantial. As a follow-on registrant of a pesticide originally developed and registered by a competitor, PPG has a vital interest in both of the central questions raised: (1) whether the statutory provisions permitting reliance on the original registrant's test data are constitutional; and (2) whether the compulsory arbitration provision of the Act is constitutional.

The decision below that the mandatory arbitration feature of the statute is unconstitutional is inextricably linked to its holding that the follow-on registration provision of FIFRA constitutes a taking. The taking issue dominates the opinion, and the decision on the arbitration provision is made without any consideration whatsoever of the extensive legislative history and judicial and administrative precedents defining the meaning of compensation under the statute.

We agree with the Government that the question of the constitutionality of the arbitration provision is not ripe for review in this case, and therefore should not be decided by the Court. PPG's district court action will afford

ample opportunity to resolve that issue; indeed, PPG has squarely raised the issue in a motion for summary judgment in that case. Should this Court, however, reach that issue, we present our position here on the constitutionality of the arbitration provision.

This brief will not address the taking question, as we believe that issue will be fully briefed and presented by the Government. We discuss only the constitutionality of the arbitration provision. It is our position that the arbitration provision is constitutional only if there are defined substantive standards limiting the arbitrators' discretion, and if the Act also provides for judicial review of awards to assure compliance with such standards. As we show, when read in light of its legislative history, the Act provides standards for determining compensation, and also provides for judicial review. For these reasons, the arbitration provision satisfies the requirements of the Constitution.

SUMMARY OF ARGUMENT

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court recognized a narrow exception to the general principle that the federal judicial function can be performed only by Article III courts. That exception permits non-Article III decision-makers, such as administrative agencies, masters, and arbitrators, to adjudicate federally created rights, but only if their discretion is limited by clearly defined legislative standards and their decisions are subject to adequate judicial review. To be constitutional, therefore, the compulsory arbitration provision of FIFRA must meet that test. We submit that it does.

The compulsory arbitration provision in Section 3(c)(1)(D)(ii) of FIFRA must be construed in light of its

purposes and legislative history. So construed, it defines a narrow, fact-finding role for arbitrators to resolve compensation disputes. That role is to determine the direct costs incurred by the original registrant in developing the test data relied on by the follow-on registrant, and to apportion those costs fairly, equitably, and reasonably between the parties. Arbitrators who go beyond this limited statutory function run afoul of the substantive standard established by the Act.

The follow-on registration procedures in Section 3(c)(1)(D) of FIFRA were designed by Congress as an effective way to avoid wasteful and duplicative testing by industry and review by EPA, to reduce costs and minimize delays, and to enhance competition in the pesticide industry. The statute was not intended to provide economic windfalls to original registrants, create barriers to market entry, or effectively extend the duration of patent grants beyond the time provided by law. Accordingly, compensation awards under FIFRA must be based only on the costs incurred by the initial pesticide registrant in developing the relevant test data required by EPA, and must be limited to a fair share of those costs. FIFRA does not contemplate or authorize a wide-open, limitless inquiry into other factors, such as the economic "value" or "benefit" to a follow-on registrant in relying on the data filed by the original registrant.

The judicial review provision in Section 3(c)(1)(D)(ii), although limited in scope, allows federal district courts to determine whether an arbitration award is in accordance with law, and whether the arbitrators have exceeded their authority by basing the award on factors not permitted by the Act. Accordingly, the judicial review provision satisfies the constitutional requirement laid down in *Northern Pipeline, supra.*

ARGUMENT

The court below relied on *Northern Pipeline, supra*, as support for its holding that FIFRA's mandatory arbitration provision is unconstitutional. J.S. App. at 34a-35a. *Accord Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, No. 76 Civ. 2913 (RO) (S.D.N.Y. July 28, 1983), slip. op. at 9. If FIFRA were to be construed—erroneously, in our view—to allow an open-ended, standardless arbitration proceeding, with no opportunity for judicial review, these decisions would be correct. But this is not the case.

To survive constitutional scrutiny the arbitration provision must meet two fundamental criteria articulated in *Northern Pipeline:* (a) it must provide substantive standards limiting the role of arbitrators, and (b) it must afford an opportunity for judicial review of the arbitrator's award. As this Court stated:

> [I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which the right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges . . . . [However,] the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court.

Northern Pipeline, 458 U.S. at 80-81 (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)). For the FIFRA arbitration provision to satisfy the "adjunct exception," the arbitrators must perform "statutorily channeled fact-finding functions," *Northern Pipeline*, 485 U.S. at 85, and "the ultimate decision [must be] made by the district court," *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980).

It is axiomatic that federal statutes have a presumption of constitutionality, *Immigration & Naturalization Serv-*

ice v. *Chadha*, 103 S. Ct. 2764, 2780 (1983), and should be construed so as to uphold their constitutionality, *IAM* v. *Street*, 367 U.S. 740, 749 (1961). FIFRA is susceptible to such a construction.

A careful reading of Section 3(c)(1)(D) of FIFRA and its legislative history shows that the arbitrators' authority in data compensation proceedings is narrowly defined. Moreover, FIFRA provides adequate review authority for federal district courts to ensure that arbitrators do not exceed their statutory authority by basing their awards on criteria not permitted by the Act.

I. FIFRA Requires That Compensation Be Based On A Sharing Of The Direct Cost Of Test Data Necessary For Registration.

A. The Statute and Its Legislative History.

FIFRA is a health and safety statute requiring prospective pesticide sellers to register products with EPA. That Agency may not grant a registration until it analyzes the submitted data and finds that the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). Section 3(c)(1)(D) requires applicants for registration to submit to EPA test data concerning the safety of their products.

The statute recognizes in Section 3(c)(1)(D)(ii) that other applicants may seek to register a product identical or substantially similar to one previously registered, and permits such follow-on applicants to rely on data already in the Agency's files, provided they offer to compensate the original data submitter.[1] This procedure was de-

[1] From 1978 through 1983 EPA's "cite-all" regulation *required* all follow-on registrants to rely on previously submitted data. 40 C.F.R. § 162.9-4 (1983). The cite-all regulation eliminated any incentive for a

signed to prevent "*the necessity of costly duplicative testing* in order to produce governmentally-mandated data without thereby casting the entire [financial] burden upon the party first to meet the government's requirements by producing and submitting that data." *Mobay Chemical Corp.* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1572, 1578 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam) (emphasis added). If follow-on registrants could not rely on previously submitted data, the resultant duplicative testing "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources." S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4092.

The legislative history of Section 3(c)(1)(D) exhibits a basic, recurring theme: compensation is limited to a fair and equitable sharing (or partial reimbursement) of the direct costs incurred by the original registrant in producing test data necessary for registration.

Prior to 1972, EPA routinely considered relevant data contained in its files to evaluate new applications for a previously registered pesticide. *See, e.g.*, S. Rep. No. 838

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follow-on registrant to perform and submit its own tests, since it would be required in any case to compensate previous submitters of data. The regulation was in effect at all times pertinent to PPG's registrations of butylate.

Two years after PPG had obtained its follow-on registrations and while the PPG-Stauffer arbitration was pending, a district court held that the cite-all regulation "exceed[ed] the regulatory authority granted to the EPA by Section 3(c) of FIFRA." *National Agricultural Chem. Ass'n* v. *EPA*, 554 F. Supp. 1209, 1212 (D.D.C. 1983). The Court permanently enjoined EPA from denying follow-on registration applications based solely upon the applicant's own data. *Id.*

(Part II) 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4040-41; *Mobay Chemical Corp.* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1572, 1580 n.22 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam).

In 1972, Congress considered substantive amendments to FIFRA and for the first time enacted a follow-on registration provision that required a subsequent registrant to pay compensation to the initial registrant. Large pesticide producers wanted to preclude reliance by subsequent registrants on data previously submitted by others to EPA and lobbied for "exclusive use" amendments to FIFRA. In considering and rejecting exclusive use proposals, the Senate Committee on Commerce found that such provisions would erect

> barriers to entry in the pesticides industry . . . which go far beyond that envisioned by our patent system. In effect, whether or not a pesticide has patent protection, a manufacturer wishing to register a pesticide previously registered would have to duplicate the required test data . . . . In the extreme, a monopoly in the production of a pesticide could ensue if competitors are unable to afford the sometimes costly safety and efficacy tests.

S. Rep. No. 970, 92d Cong., 2d Sess. 12, *reprinted in* 1972 U.S. Code & Ad. News 3993, 4096.

The legislation enacted in 1972 established a system allowing EPA to rely on test data already in EPA's files, provided the follow-on registrant offered to pay compensation to the initial registrant and submit data compensation disputes to EPA administrative law judges. Compensation was to be limited to a "system under which permission to use the test data *in return for a reasonable share of the cost of producing the data* would be required." S. Rep. No. 838, (Part II), 92d Cong., 2d Sess.

69, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4089 (emphasis added). A statement of legislative intent accompanying the proposed legislation explained that "fairness and equity require *a sharing of the governmentally required cost of producing the test data* used in support of the [subsequent application]." *Id.* at 72-73, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4092 (emphasis added). Requiring subsequent applicants to produce their own test data "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources." *Id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4092.

In 1975, Congress again amended FIFRA to eliminate uncertainty as to whether data submitted to EPA prior to 1972 were compensable. Congress resolved the question by establishing a cut-off date of January 1, 1970, thereby codifying a regulatory policy adopted by EPA as early as 1973. *See* 38 Fed. Reg. 31862 (Nov. 19, 1973). In its consideration of the 1970 cut-off, the Senate Committee on Agriculture and Forestry reported that "to require *cost sharing* with respect to 'old data' [pre-1970] . . . could create a windfall for producers of this data since such data was prepared without any reasonable expectation that the law would require *sharing of the costs of production*." S. Rep. No. 452, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1367-68 (emphasis added). The Committee confirmed that Section 3(c)(1)(D) was designed "to provide for *equitable sharing among industry members of the cost* of producing data necessary to obtain or continue a registration under the Act." *Id.*, *reprinted in* 1975 U.S. Code Cong. & Ad. News at 1367 (emphasis added).

Moreover, several members of the House Committee on Agriculture, which also considered the 1975 amend-

ments, stated in supplemental views contained in the Committee Report:

> Reasonable compensation should be an equitable *sharing* of the direct costs of producing governmentally required test data. It should not be based upon a "value" basis. No profit should accrue to the original applicant . . . .

H.R. Rep. No. 497, 94th Cong., 1st Sess. 65 (1975) (emphasis in original).

FIFRA was again amended in 1978. The substantive standard for compensation, cost-sharing, was not altered. Congress did, however, change the process for resolving compensation disputes by providing for mandatory arbitrations to be conducted under the auspices of the Federal Mediation and Conciliation Service.[2]

The legislative history of the 1978 amendments expresses reaffirmation of the cost-sharing standard for compensation. The Senate Report recognized "the cost of data development and *the need for cost-sharing among registrants.*" S. Rep. No. 334, 95th Cong., 1st Sess. 4 (1977) (emphasis added). The Report went on to explain:

> The amendments in S. 1678 recognize the proprietary interest in health and safety data on the part of

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[2] Congress also amended Section 3(c)(1)(D) to provide a limited form of exclusive use protection for future data submitted for innovative products and uses. Specifically, Congress provided that data submitted after September 30, 1978, for new products and new uses for those products could receive up to 10 years of exclusive use protection (*i.e.*, no follow-on registrations could be based on that data) followed by a limited period of five years during which compensation could be obtained. Pub. L. No. 95-396, § 2, 92 Stat. 819 (1978) (codified at 7 U.S.C. § 136a(c)(1)(D) (1982)). This incentive for new products was provided without at the same time creating windfalls to those who had registered products before 1978.

> pesticide registrants who underwrite the expense of obtaining such data. It eliminates the "free-rider" situation to which industry has objected, but *keys the amount of payment by subsequent registrants to the costs of developing data necessary for government approval, not the costs of developing the pesticide.* The amendments also avoid an extension of the patent rights on chemicals.

Id. at 31 (emphasis added).

The cost-sharing standard of compensation is unequivocally established in the legislative history, and is the only interpretation consistent with the structure of the statute. FIFRA allows the applicant the option to submit "a full description of the tests made and the results thereof upon which their claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator . . . ." 7 U.S.C. § 136a(c)(1)(D). Given the choice provided by Congress for a follow-on registrant to submit its own data or offer compensation, and given the congressional intention to avoid costly and wasteful duplicative testing, compensation must amount to, and be based on, some share of the cost of producing the data. If compensation could exceed the cost of the data, no follow-on registrant would elect the compensation route, and Congress' intentions to avoid duplicative testing and enhance competition would be frustrated.

The legislative history is consistent throughout. Whenever Congress discussed the meaning of compensation, it defined compensation as based on an equitable and reasonable share of the direct costs of providing the test data necessary for registration.

B. Administrative Interpretation of Section 3(c)(1)(D)(ii).

Prior to the procedural amendments to FIFRA establishing mandatory arbitration for data compensation disputes, an EPA administrative law judge ("ALJ") was assigned that responsibility. Two compensation cases were decided, both by ALJ Gerald Harwood. *Ciba-Geigy Corp.* v. *Farmland Industries, Inc.*, FIFRA COMP. Dkt. Nos. 33, 34 & 41 (Aug. 19, 1980), Final Order issued by the Judicial Officer (Apr. 30, 1981), *affirmed by the Administrator* (July 28, 1981), and *Union Carbide Agricultural Products Co.* v. *Thompson-Hayward Chemical Co.*, FIFRA COMP. Dkt. No. 27 (July 13, 1982). Judge Harwood undertook in both cases an exhaustive analysis of the statute and its legislative history. In each opinion, he rejected an award in excess of data costs, as proposed by the original data submitter. Instead, the decisions concluded that Congress intended follow-on registrants to pay a fair share of the cost of producing relevant test data previously submitted by the initial registrant.

The ALJ found in each case that cost-sharing implemented the congressional intent of FIFRA: it recognized the private interest of the original data submitter in recovering a portion of its costs and "the equally important public interest of keeping costs of entry into the pesticide business attributable to government regulation as low as possible." *Farmland*, slip op. at 46. Moreover, the compensation requirement itself was not to be used as a barrier to entry or to "extend the awards for . . . research and development . . . beyond the period allowed by the patent grant." *Id.* at 30.[3]

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[3] The ALJ also found

> no evidence in the legislative history that Congress believed that patent rights, or in their absence, exclusive use of data, would be inadequate to maintain research and development in pesticides.

Farmland, slip op. at 34 n.45.

The second FIFRA compensation decision, *Union Carbide*, succinctly summarized the underlying purpose and scope of compensation:

> FIFRA, of course, added another dimension to the marketing of pesticides, namely the additional cost in getting a product to market that may be imposed by FIFRA's registration requirements. It seems clear from the legislative history that Congress felt as a matter of fairness, if for no other reason, that the first registrant should not be saddled with the entire burden of this additional cost. But it would appear that it was only with the incremental cost of obtaining a registration that Congress appears to have been concerned about, and the desirability of neutralizing any adverse effect on research and development which would be caused if the entire testing cost were imposed on the first registrant. Over and above this, the incentive for research and development, and a company's investment in it, would still have to come from the profits to be gained in the sale of the product and from whatever competitive advantage accrued to it from patents or secret processes.

Id. at 21.

In *Farmland* and *Union Carbide*, the initial registrants requested an amount far exceeding their own investment in the test data required for registration. In each, the amount requested by the initial registrant far exceeded what the follow-on registrant would have had to pay to prepare its own test data packages for EPA. The ALJ rejected these requests and issued an award based on cost-sharing. In *Farmland* the award was $240,682, and in *Union Carbide* $51,760.

The ALJ's interpretation of Section 3(c)(1)(D) is consistent with EPA's regulations implementing that provision. EPA's regulations included an offer-to-pay state-

ment, which EPA required all registration applicants to sign, establishing the legal scope of the offer to compensate. *See* 40 C.F.R. §§ 162.9-2, 162.9-4 (1983). This statement limited the compensation obligation to data submitted by the original registrant that were scientifically relevant to the follow-on applicant's registration. It required each applicant to acknowledge that it "relies on . . . [e]ach . . . item of data in the Agency's files" that "concerns the properties or effects of" applicant's product or one identical or substantially similar to it and "[i]s one of the types of data that EPA would require to be submitted for scientific review by EPA if the application sought the initial registration [of the product] under FIFRA . . . under the data requirements in effect on the date EPA approves applicants' present application." 40 C.F.R. § 162.9-4 (1983).

C. Judicial Decisions.

The major judicial precedents relied upon by the Government to support the position that Section 3(c)(1)(D) of FIFRA does not constitute a taking of an original data submitter's property also demonstrate that compensation is limited to a sharing of registration test data costs. For example, in *Chevron Chemical Co.* v. *Costle*, 641 F.2d 104 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981), the court quoted FIFRA's legislative history in explaining its understanding of compensation under Section 3(c)(1)(D):

> [I]t was decided that fairness and equity required *a sharing of the governmentally required cost* of producing the test data used in support of an application by an applicant other than the originator of such data.

641 F.2d at 109 (footnote omitted) (emphasis added). *See also Amchem Products, Inc.* v. *GAF Corp.*, 594 F.2d 470,

481 (5th Cir.), *modified*, 602 F.2d 724 (5th Cir. 1979); *Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024, 1028 n.2 (N.D. Cal. 1978) (purpose of data compensation was "saving the cost of duplicative test data").

In *Mobay Chemical Corp.* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1572 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam), a three-judge court concluded that the compensation system under FIFRA provided limited protection to "the expenditure of the first applicant in generating the data." *Id.* at 1578. The court added that

> neither the legislative history nor the plain language of § 3 indicate[s] that in adopting its regulatory scheme Congress was concerned with ensuring maintenance of competitive commercial positions of the original submitters of data. Rather, the *Congressional concern in adopting the original § 3(c)(1)(D) in 1972 was for maximum allocation of resources in the public interest—preventing the necessity of costly duplicative testing* in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government requirements by producing or submitting that data.

Id. (citing S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72-73 (1972)) (emphasis added).

Finally, in another case, also entitled *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978), *modified*, 517 F. Supp. 252 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chemical Corp.* v. *Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982), the court rejected a broad-based attack on the FIFRA registration system, and concluded:

> But FIFRA was not intended to shelter pesticide registrants from the rigors of commercial competi-

> tion. *The protection afforded by § 3(c)(1)(D) extends only to compensation for producing the test data used in the registration process, and not to the ultimate economic or commercial benefits which may flow from the registration itself.*

447 F. Supp. at 834 (emphasis added).

Just as these courts were correct in determining that the follow-on registration provision does not constitute a taking of property under the Fifth Amendment, their analyses of the scope of compensation were also correct; as shown above, cost-sharing is soundly based in the legislative history of Section 3(c)(1)(D).

II. FIFRA Provides For Judicial Review Of Arbitration Awards.

In its case pending in district court, PPG has contended that there is adequate authority in the statute to allow federal district courts to determine whether arbitrators have exceeded their authority under FIFRA. In the absence of such provision for judicial review, the mandatory arbitration provision would fail the test of *Northern Pipeline*.

Section 3(c)(1)(D)(ii) allows arbitration awards to be reviewed for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrators." 7 U.S.C. § 136a(c)(1)(D)(ii). In the PPG-Stauffer arbitration, the arbitrators correctly recognized that " 'misconduct' on the part of arbitrators can include their acting in excess of their powers, or 'perversely misconstruing the law.' " Award at 2 n.* (quoting *Amicizia Societa Navigazione* v. *Chilean Nitrate Etc.*, 184 F. Supp. 116 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 805 (2d Cir. 1960)). This statutory provision satisfies the need for judicial review. There is no justification for attributing to

Congress any intent to abrogate the settled principles of judicial review of arbitration awards.

As this Court has recognized, arbitration decisions are subject to judicial review to ensure that the arbitrators have not exceeded their lawful authority. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Arbitrators' powers are circumscribed by the source from which their authority is derived. *Monongahela Power Co.* v. *Local No. 2332*, 566 F.2d 1196, 1199 (4th Cir. 1976). Whether arbitrators have exceeded the scope of their authority "is an issue for judicial resolution." *Piggly Wiggly Operators' Warehouse, Inc.*, v. *Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580, 583 (5th Cir. 1980). When the court finds that arbitrators have exceeded their authority, their awards "cannot be enforced." *United States Postal Service* v. *National Rural Letter Carriers Association*, 535 F. Supp. 1034, 1037 (N.D. Ohio 1982).

When arbitrators' authority derives from a contract between the parties, the resultant award is invalid and unenforceable if the arbitrators exceed their powers under the contract. The arbitral award must be overturned unless it "draws its essence from the collective bargaining agreement." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Courts will deny enforcement to and vacate arbitral awards that exceed the arbitrators' contractual authority. *Totem Marine Tug & Barge, Inc.* v. *North American Towing, Inc.*, 607 F.2d 649, 561 (5th Cir. 1979); *Washington Hospital Center* v. *Service Employees International Union*, 112 L.R.R.M. (BNA) 3008 (D.D.C. 1983); *Zeigler Coal Co.* v. *District 12, United Mine Workers of America*, 484 F. Supp. 445, 447 (C.D. Ill. 1980); *International Brotherhood of Electrical Workers* v. *E.I.*

DuPont de Nemours & Co., 420 F. Supp. 208, 210 (E.D. Va. 1976).

Under FIFRA, the arbitrators' power derives not from contract, but from a statute that creates a form of mandatory arbitration. Because of the due process implications of such a procedure,[4] it follows *a fortiori* that Congress intended federal courts to review FIFRA compensation determinations carefully and vacate the awards if the arbitrators exceed the authority granted them by the statute. So construed, FIFRA is unquestionably constitutional.

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[4] The mandatory nature of the arbitration provision raises substantial due process problems. *See Charles Wolff Packing Co.* v. *Court of Indus. Relations*, 262 U.S. 522 (1923); *Midkiff* v. *Tom*, 471 F. Supp. 871, 883-84 (D. Hawaii 1979); *United Farm Workers* v. *Babbitt*, 449 F. Supp. 449, 466 (D. Ariz. 1978), *rev'd on other grounds*, 442 U.S. 289 (1979). Due process requires that the FIFRA arbitrators be limited to a carefully circumscribed fact-finding role, and not engage in the interpretation of a complex federal statute. *See Mount St. Mary's Hospital* v. *Catherwood*, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 872 (Ct. App. 1970) (provision of mandatory "*ad hoc* tribunals to resolve disputes without limitation to rules of law" is unconstitutional). Due process also requires that there be judicial review adequate to ensure that FIFRA arbitrators' factual findings are supported by evidence in the record and are not arbitrary or capricious. Such safeguards guarantee that the awards "imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in law and the record before him." *Id.* at 873 (citation omitted).

CONCLUSION

For all the reasons set forth above, PPG submits that FIFRA delegates to arbitrators a narrow fact-finding role, subject to judicial review. Thus, the mandatory arbitration provision is constitutional.

Respectfully submitted,

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